



FEDERAL ELECTION COMMISSION

WASHINGTON, D C 20463

AUG 4 2005

G. Scott Rafshoon, Esq.
McKenna, Long & Aldridge
303 Peachtree Street N.E.
Suite 5300
Atlanta, Georgia 30308

RE: MUR 5480

Dear Mr. Rafshoon:

On July 21, 2004, the Federal Election Commission notified your clients of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, the Commission, on June 21, 2005, found that there is reason to believe that Liane Levetan violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d), Levetan for Senate and Dorothy E. Williams, in her official capacity as treasurer violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d), and Levetan for Congress and Dorothy E. Williams, in her official capacity as treasurer, violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d), 2 U.S.C. § 434(b)(3)(B) and 11 C.F.R. § 104.3(d). The Commission also decided to take no further action as to the reason to believe finding that Liane Levetan for Congress and Dorothy E. Williams, in her official capacity as treasurer, violated 2 U.S.C. § 434(b)(4) and 11 C.F.R. § 104.3(d). In addition, the Commission, in its exercise of prosecutorial discretion, took no action with respect to allegations that Liane Levetan for Congress and Dorothy Williams, in her official capacity as treasurer, violated 2 U.S.C. § 434(b)(5) and 11 C.F.R. § 104.3(b)(4). The Factual and Legal Analyses, which formed a basis for the Commission's findings, are attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

In order to expedite the resolution of this matter, the Commission has also decided to offer to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Enclosed is a conciliation

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agreement that the Commission has approved. If you are interested in expediting the resolution of this matter by pursuing pre-probable cause conciliation, and if you agree with the provisions of the enclosed agreement, please sign and return the agreement, along with the civil penalty, to the Commission. In light of the fact that conciliation negotiations, prior to a finding of probable cause to believe, are limited to a maximum of 30 days, you should respond to this notification as soon as possible.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. If you have any questions, please contact Kimberly Hart, the staff attorney, assigned to this matter, at (202) 694-1650.

Sincerely,



Scott E. Thomas
Chairman

Enclosures
Factual and Legal Analyses (3)
Conciliation Agreement

cc: Liane Levetan
2250 Chrysler Terrace
Atlanta, Georgia 30345

**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Liane Levetan for Congress and
Dorothy E. Williams, in her official
capacity as treasurer

MUR: 5480

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission ("the Commission") by Catheren M. Woolard and Friends of Cathy Woolard. *See* 2 U.S.C. § 437g(a)(1).

II. FACTUAL SUMMARY

The Complainant in this matter alleges that Liane Levetan ("Levetan"), through Levetan for Senate ("State Committee"), commissioned and paid for a consultant to conduct a poll tailored to directly benefit the Levetan for Congress Committee ("Federal Committee"), yet failed to disclose it in the Federal Committee's 2004 Pre-Primary Report; and that the poll expense constitutes an excessive contribution to the Federal Committee. In addition, the Complainant alleges that payment for the poll by the State Committee violates the prohibition against transfers of assets from a candidate's nonfederal campaign account to a principal federal campaign account; and, finally, that the Federal Committee violated disclosure requirements by failing to disclose two key pre-primary expenditures – a television ad and the candidate's filing fee.

The response asserts that the purpose of the poll was two-fold: to evaluate Levetan's rating in her old district and her chances of reelection against another incumbent in the newly redrawn district, as well as to evaluate her chances in a race for the Congressional seat. The

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response also asserts that, on July 13, 2004, the Federal Committee reimbursed the State Senate Committee for 50% of the cost of the poll, or \$10,672.50.¹ In addition, the response admits that the Federal Committee failed to disclose the correct purpose for one of its television advertising disbursements and failed to include Levetan's payment of the filing fee as part of its debts and obligations total on its 2004 Pre-Primary Report.

III. ANALYSIS

A. Public Opinion Poll

Levetan was a Georgia State Senator at the time she commissioned a public opinion poll to be conducted by Cooper & Secrest Associates in April 2004.² The public opinion poll was conducted on April 15, 17-18, 2004 and was paid for by State Senate Committee in the amount of \$21,345 on April 15, 2004.³ On April 27, 2004, while she was still a State Senator, Levetan announced her candidacy for Federal office in the 4th U.S. Congressional District of Georgia.⁴

¹ The Federal Committee provided a copy of the reimbursement check dated July 13, 2004 along with its response

² The poll became a major issue for Levetan soon after she announced her candidacy for Federal office and in the subsequent weeks leading up to the Congressional Primary race. Levetan received a great deal of criticism from her opponents for allowing her State Committee to pay for the entire cost of the poll. Levetan initially denied that the poll was intended to benefit her Federal candidacy at all or that the Federal Committee should have paid for any of the poll costs. The Respondents' response reflects a change in position with Respondents acknowledging that the poll was designed to benefit both the State and Federal committees on a 50/50 ratio basis. Respondents also asserted that the Federal Committee's reimbursement to the State Committee for 50% of the poll cost was done "in light of political circumstances" although not "legally necessary". Respondents appear to be arguing that it would have been acceptable for the State Committee to pay the entire cost of a poll that benefited the Federal committee.

³ Cooper & Secrest issued a polling advisory on April 21, 2004, stating that Levetan was "uniquely positioned to claim Representative Majette's open seat" and referring to the polling results as "compelling". The advisory also mentions one question asked of the 504 persons polled and the ranking of the responses in relation to each potential candidate. However, the polling advisory does not provide the nature of the specific question asked. Neither Cooper & Secrest nor Levetan made the poll contents or the poll results available to the public. As far as we have been able to determine, only the polling advisory was released to the public, and it only contained a portion of the poll results relating to Levetan's potential Federal candidacy.

⁴ Prior to her announcement on April 27, 2003, Levetan did not undertake actions indicating she had become a candidate. For example, she did not advertise an intention to run for Federal office, refer to herself as a candidate, or raise funds in excess of what would be expected to be used for exploratory activity. See 11 C.F.R. § 100.131(b)(1) – (b)(4). The Federal Committee did not receive its first contribution, after the testing the waters phase, until May 7, 2004. See 2 U.S.C. § 431(2)(A).

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The State Committee had been active since Levetan's election in 2002 and remained so during her 2004 Congressional campaign.

Contributions received and disbursements made solely for the purpose of determining whether an individual should become a candidate – for example, payments for polling, telephone calls and travel, are not “contributions” or “expenditures” within the meaning of the Federal Election Campaign Act of 1971, as amended (“Act”). 11 C.F.R. §§ 100.72(a), 100.131(a). Nonetheless, only funds permissible under the Act may be used for such activities. *Id.* An individual becomes a candidate for federal office – and thus triggers the registration and reporting under the Act – when campaign activity exceeds \$5,000 in either contributions or expenditures. 2 U.S.C. § 431(2)(A). However, money raised and spent solely to “test the water” does not count towards this dollar threshold until the individual decides to run for Federal office or conducts activities that indicate he or she has decided to become a candidate. 11 C.F.R. §§ 100.72(a), 100.131(a). At that point, funds raised and spent to test the waters become contributions and expenditures.

Thus, Levetan's reporting requirements are linked to two factors – her intentions and her spending. The Commission concluded that Levetan became a candidate for Federal office on April 27, 2004, when she announced her intention to seek office and after she exceeded the dollar threshold. On that date, the testing the waters phase of her candidacy ended. The \$10,672.50 she spent on her polling expenses made her a candidate. The Commission found that, as a result, the Federal Committee was required to file its contributions and expenditures after May 24, 2004.⁵ However, the Federal Committee's first disclosure report was required to

⁵ This date is based on the 15-day period in which an individual has to designate in writing a political committee to serve as his/her principal campaign committee once he/she has become a candidate and the 10-day period in which the committee has to file a statement or organization for a total of 25 days 2 U.S.C. §§ 432(e)(1), 433(a). Therefore, a candidate is given a maximum of 25 days from the time he/she becomes a candidate before

contain all contributions received and expenditures made during the “testing the waters” period regardless of the dates that the contributions were received or expenditures were made.

11 C.F.R. §§ 100.72(a), 100.131(a).

When the State Committee paid for the entire cost of a poll, the results of which were transferred to the Federal Committee, it made an in-kind contribution to the Federal Committee that was reportable once Levetan became a Federal candidate. *See* 2 U.S.C. § 434a and 11 C.F.R. § 110.3(d). While the State Committee reported its expenditure for the poll on its 2004 Election Year disclosure report filed with the Georgia Secretary of State, the Federal Committee did not disclose the receipt of this in-kind contribution on its FEC 2004 Pre-Primary Report filed on July 8, 2004. The Commission concluded that this omission from the Federal Committee’s report violates 2 U.S.C. § 434(b)(3)(B).

Because Levetan continued to run campaign committees for both her state senate position and her election to federal office, the complaint questions whether her congressional campaign was helped by expenditures made by her ongoing state senate committee account. Federal candidates or entities directly or indirectly established, financed, maintained or controlled by them, are restricted from soliciting, receiving, directing, transferring, or spending “soft money”, i.e. non-federal funds that are not subject to the limitations of the Act.⁶ 2 U.S.C. § 441i(e)(1)(A). Further, transfers from a candidate’s campaign committee or account for a nonfederal election to his or her principal campaign committee or other authorized committee for a Federal election are

his/her authorized committee must begin filing disclosure reports pursuant to 2 U S C § 434(a) Levetan designated Liane Levetan for Congress to serve as her principal campaign committee and filed the Federal Committee’s Statement of Organization on May 11, 2004, in accordance with the requirements of the Act As a result, the Federal Committee’s first report was due after May 24, 2004.

⁶ The Commission concluded that there were no violations of 2 U S C §§ 441i(e)(1)(B) or (e)(2) since Levetan was a legitimate state candidate at that time

prohibited. 11 C.F.R. § 110.3(d).⁷ The Commission found that Levetan's transfer of the poll results from the State Committee to the Federal Committee was a prohibited transfer in violation of the Act and regulations. See 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d).⁸

Although the State Committee initially paid for the entire cost of the poll, the Commission found that the poll was intended to benefit both Levetan's potential State and Federal campaigns. The Commission found that one purpose of the poll was to aid Levetan in deciding whether to run for re-election or seek Federal candidacy. Section 106.4(a) of the regulations states that the purchase of opinion poll results by a candidate or a candidate's authorized political committee or agent is an expenditure by the candidate. 11 C.F.R. § 106.4(a). Section 106.4(e)(1) through (e)(4) provide several different methods for calculating the amount of the expenditure attributable to each candidate-recipient. 11 C.F.R. §§ 106.4(e)(1) – (e)(4). One of those methods, found in section 106.4(e)(2), provides that the amount of the expenditure attributable to the state candidate recipient Levetan and Federal candidate recipient Levetan can be computed by dividing the overall cost of the poll equally among the candidates (including State and local candidates) receiving the results. 11 C.F.R. § 106.4(e)(2). In this instance, the State Committee was acting as an agent for candidate Levetan when it purchased the opinion poll results. Accordingly, dividing the cost of the poll, \$21,345, equally among the candidates receiving the results, results in an allocation of 50% for each candidate for the poll cost, or \$10,672,50.

⁷ The Commission made clear its decision to "effectively prevent the indirect use of impermissible funds in federal elections" and explained that "a prohibition on all transfers from state to federal campaigns, is the best way to address concerns raised in the Petition for Rulemaking." *Explanation and Justification* for 11 C.F.R. § 110.3(d) at 57 Fed. Reg. 36,344 (August 12, 1992).

⁸ The State of Georgia allows corporations to make contributions to State elections so it possible that a portion of the funds used by the State Senate Committee to pay for the poll came from sources prohibited by the Act. See Ga. Code § 21-5-41 (2005).

The Federal Committee, on July 13, 2004, reimbursed the State Senate Committee for 50% of the cost of the poll, or \$10,672.50 and disclosed the reimbursement on its October 2004 Quarterly Report as it indicated it would in its response.⁹ The Commission found reason to believe that the Federal Committee violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d) by accepting a prohibited transfer from Levetan for Senate and that the Federal Committee violated 2 U.S.C. § 434(b)(3)(B) by failing to disclose its receipt of the in-kind contribution from Liane Levetan for Senate.

B. Television Advertising Disclosure

The Federal Committee acknowledges that it failed to properly disclose the correct purpose for one of its disbursements for television advertising in its 2004 Pre-Primary Report. Although the Federal Committee asserts that the disclosure report accurately reflects the amount of two disbursements to Media Strategies for the purchase of television advertising, each for \$20,157, it admits that the entry for one of these disbursements incorrectly lists its purpose as "Production (Media)" and the Federal Committee amended its 2004 Pre-Primary Report to reflect the correct purpose of the "TV-Cable Buy" for the Media Strategies disbursement.¹⁰

Section 11 C.F.R. § 104.3(b)(4) provides that each disbursement disclosed by an authorized committee must contain the date, amount and purpose of each expenditure.

11 C.F.R. § 104.3(b)(4). The regulations define "purpose" as a brief statement or description of

⁹ The Federal Committee amended its disclosure report in October 2004, within three months of the July 8, 2004 due date for the 2004 Pre-Primary Report.

¹⁰ The complaint alleged that the Federal Committee failed to accurately disclose \$17,088 in television airtime purchase in its Pre-Primary Report. The Commission reviewed the disclosure reports along with the Federal Committee's response. None of the Federal Committee's disclosure reports contain a disbursement to Media Strategies for the purchase of television airtime totaling \$17,088. Rather, the Federal Committee's disbursements for the purchase of television airtime were made to Media Strategies for \$20,157. Therefore, the Commission concludes that the Complainant listed the incorrect amount for the disbursement at issue in its complaint. The correct amount for television airtime purchase at issue should be \$20,157 versus the \$17,088 alleged in the complaint.

why the disbursement was made, and provides as an example of an adequate description the term “media.” See 11 C.F.R. § 104.3(b)(4)(a). The Federal Committee initially included the term “Production (media)” in describing the purpose of its disbursement to Media Strategies. That description, however, was factually inaccurate as the disbursement was not for *production*; it was for a TV-Cable *Buy*.

However, because of the limited impact of this factual inaccuracy and because the Federal Committee amended its report within a reasonable timeframe, the Commission exercised its prosecutorial discretion to take no action with respect to these facts.

C. Democratic Party Filing Fee Disclosure

The Federal Committee acknowledges that it failed to disclose an expenditure for Levetan’s Democratic Party filing fee, totaling \$4,641.00, in its 2004 Pre-Primary Report in violation of section 104.3(d). 11 C.F.R. § 104.3(d). It asserts that the Federal Committee listed its debts and obligations on Schedule D of its 2004 Pre-Primary Report totaling \$12,847.82, but inadvertently omitted the amount of the Democratic Party filing fee.¹¹ The Federal Committee stated that the filing fee of \$4,641 would be included in the total of debts and obligations on the Schedule D of its amended report and it has been so reflected in its 2004 Amended Pre-Primary Report.¹² The Federal Committee’s amendment of its disclosure report was done within three months of the filing of the complaint.

Therefore, the Commission found reason to believe that the Federal Committee violated 2 U.S.C. § 434(b)(4) and 11 C.F.R. § 104.3(d) by failing to include the Democratic Party filing

¹¹ In addition, the Federal Committee noted that “debts and obligations need not be independently itemized since they are all amounts owed to Senator Levetan ”

¹² In addition, the Federal Committee also included, in its October 2004 Quarterly Report, a disbursement made to Levetan, totaling \$4,641 00, as reimbursement for her initial payment of the Democratic Party filing fee

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fee as a part of the outstanding debt total owed to Liane Levetan on Schedule D of its 2004
Pre-Primary Report.

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**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Liane Levetan

I. GENERATION OF THE MATTER

This matter was generated by a complaint filed with the Federal Election Commission ("Commission") by Catheren M. Woolard and Friends of Cathy Woolard. *See* 2 U.S.C. § 437g(a)(1).

II. FACTUAL SUMMARY

The Complainant in this matter alleges that Liane Levetan ("Respondent"), through Levetan for Senate ("State Committee"), commissioned and paid for a consultant to conduct a poll tailored to directly benefit the Levetan for Congress Committee ("Federal Committee"), yet failed to disclose it in the Federal Committee's 2004 Pre-Primary Report; and that the poll expense constitutes an excessive contribution to the Federal Committee. In addition, the Complainant alleges that payment for the poll by the State Committee violates the prohibition against transfers of assets from a candidate's nonfederal campaign account to a principal federal campaign account; and, finally, that the Federal Committee violated disclosure requirements by failing to disclose two key pre-primary expenditures – a television ad and the candidate's filing fee.

The response asserts that the purpose of the poll was two-fold: to evaluate Respondent's rating in her old district and her chances of reelection against another incumbent in the newly redrawn district, as well as to evaluate her chances in a race for the Congressional seat. The response also asserts that, on July 13, 2004, the Federal Committee reimbursed the State Senate

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Committee for 50% of the cost of the poll, or \$10,672.50.¹ In addition, the response admits that the Federal Committee failed to disclose the correct purpose for one of its television advertising disbursements and failed to include Respondent's payment of the filing fee as part of its debts and obligations total on its 2004 Pre-Primary Report.

III. ANALYSIS

Respondent was a Georgia State Senator at the time she commissioned a public opinion poll to be conducted by Cooper & Secrest Associates in April 2004.² The public opinion poll was conducted on April 15, 17-18, 2004 and was paid for by the State Committee in the amount of \$21,345 on April 15, 2004.³ On April 27, 2004, while she was still a State Senator, Respondent announced her candidacy for Federal office in the 4th U.S. Congressional District of Georgia.⁴ The State Committee had been active since Respondent's election in 2002 and remained so during her 2004 Congressional campaign.

¹ The Federal Committee provided a copy of the reimbursement check dated July 13, 2004 along with its response

² The poll became a major issue for Respondent soon after she announced her candidacy for Federal office and in the subsequent weeks leading up to the Congressional Primary race Respondent received a great deal of criticism from her opponents for allowing her State Committee to pay for the entire cost of the poll Respondent initially denied that the poll was intended to benefit her Federal candidacy at all or that the Federal Committee should have paid for any of the poll costs The response reflects a change in position with the complaint Respondents acknowledging that the poll was designed to benefit both the State and Federal committees on a 50/50 ratio basis The complaint Respondents also asserted that the Federal Committee's reimbursement to the State Committee for 50% of the poll cost was done "in light of political circumstances" although not "legally necessary" The complaint Respondents appear to be arguing that it would have been acceptable for the State Committee to pay the entire cost of a poll that benefited the Federal committee

³ Cooper & Secrest issued a polling advisory on April 21, 2004, stating that Respondent was "uniquely positioned to claim Representative Majette's open seat" and referring to the polling results as "compelling" The advisory also mentions one question asked of the 504 persons polled and the ranking of the responses in relation to each potential candidate However, the polling advisory does not provide the nature of the specific question asked Neither Cooper & Secrest nor Respondent made the poll contents or the poll results available to the public As far as we have been able to determine, only the polling advisory was released to the public, and it only contained a portion of the poll results relating to Respondent's potential Federal candidacy.

⁴ Prior to her announcement on April 27, 2003, Respondent did not undertake actions indicating she had become a candidate For example, she did not advertise an intention to run for Federal office, refer to herself as a candidate, or raise funds in excess of what would be expected to be used for exploratory activity See 11 C F R

The Commission found that Respondent became a candidate for Federal office on April 27, 2004, when she announced her intention to seek office and after she exceeded the dollar threshold. Because Respondent continued to run campaign committees for both her state senate position and her election to federal office, the complaint questions whether her congressional campaign was helped by expenditures made by her ongoing state senate committee account. Federal candidates or entities directly or indirectly established, financed, maintained or controlled by them, are restricted from soliciting, receiving, directing, transferring, or spending "soft money", i.e. non-federal funds that are not subject to the limitations of the Act.⁵ 2 U.S.C. § 441i(e)(1)(A). Further, transfers from a candidate's campaign committee or account for a nonfederal election to his or her principal campaign committee or other authorized committee for a Federal election are prohibited. 11 C.F.R. § 110.3(d).⁶

The Commission found that the transfer of the poll results by the State Committee, acting as Respondent's agent, to the Federal Committee was a prohibited transfer in violation of the Act and regulations. See 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d).⁷ The Commission also concluded that, when the State Committee paid for the entire cost of a poll, the results of which were transferred to the Federal Committee, it made an in-kind contribution to the Federal Committee.

§ 100 131(b)(1) – (b)(4) The Federal Committee did not receive its first contribution, after the testing the waters phase, until May 7, 2004 See 2 U S C § 431(2)(A)

⁵ The Commission concluded that there were no violations of 2 U S C §§ 441i(e)(1)(B) or (e)(2) since Respondent was a legitimate state candidate at that time

⁶ The Commission made clear its decision to "effectively prevent the indirect use of impermissible funds in federal elections" and explained that "a prohibition on all transfers from state to federal campaigns, is the best way to address concerns raised in the Petition for Rulemaking" *Explanation and Justification* for 11 C F R § 110 3(d) at 57 Fed Reg 36,344 (August 12, 1992)

⁷ The State of Georgia allows corporations to make contributions to State elections so it possible that a portion of the funds used by the State Senate Committee to pay for the poll came from sources prohibited by the Act See Ga Code § 21-5-41 (2005)

Although the State Committee initially paid for the entire cost of the poll, the Commission found that the poll was intended to benefit both Respondent's potential State and Federal campaigns. The Commission also found that one purpose of the poll was to aid Respondent in deciding whether to run for re-election or seek Federal candidacy. Section 106.4(a) of the regulations states that the purchase of opinion poll results by a candidate or a candidate's authorized political committee or agent is an expenditure by the candidate. 11 C.F.R. § 106.4(a). Section 106.4(e)(1) through (e)(4) provide several different methods for calculating the amount of the expenditure attributable to each candidate-recipient. 11 C.F.R. §§ 106.4(e)(1) – (e)(4). One of those methods, found in section 106.4(e)(2), provides that the amount of the expenditure attributable to the state candidate recipient Levetan and Federal candidate recipient Levetan can be computed by dividing the overall cost of the poll equally among the candidates (including State and local candidates) receiving the results. 11 C.F.R. § 106.4(e)(2). In this instance, the State Committee was acting as an agent for candidate Levetan when it purchased the opinion poll results. Accordingly, dividing the cost of the poll, \$21,345, equally among the candidates receiving the results, results in an allocation of 50% for each candidate for the poll cost, or \$10,672,50.

The Federal Committee, on July 13, 2004, reimbursed the State Committee for 50% of the cost of the poll, or \$10,672,50 and disclosed the reimbursement on its October 2004 Quarterly Report as it indicated it would in its response.⁸ Therefore, the Commission found reason to believe that the Respondent violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d) by making a prohibited transfer to Levetan for Congress.

⁸ The Federal Committee amended its disclosure report in October 2004, within three months of the July 8, 2004 due date for the 2004 Pre-Primary Report

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**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Liane Levetan for Senate
and Dorothy E. Williams, in her
official capacity as treasurer

MUR: 5480

I. GENERATION OF THE MATTER

This matter was generated by a complaint filed with the Federal Election Commission ("Commission") by Catheren M. Woolard and Friends of Cathy Woolard. *See* 2 U.S.C. § 437g(a)(1).

II. FACTUAL SUMMARY

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The response asserts that the purpose of the poll was two-fold: to evaluate Levetan's rating in her old district and her chances of reelection against another incumbent in the newly redrawn district, as well as to evaluate her chances in a race for the Congressional seat. The response also asserts that, on July 13, 2004, the Federal Committee reimbursed the State Senate

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Committee for 50% of the cost of the poll, or \$10,672.50.¹ In addition, the response admits that the Federal Committee failed to disclose the correct purpose for one of its television advertising disbursements and failed to include Levetan's payment of the filing fee as part of its debts and obligations total on its 2004 Pre-Primary Report.

III. ANALYSIS

Levetan was a Georgia State Senator at the time she commissioned a public opinion poll to be conducted by Cooper & Secrest Associates in April 2004.² The public opinion poll was conducted on April 15, 17-18, 2004 and was paid for by State Senate Committee in the amount of \$21,345 on April 15, 2004.³ On April 27, 2004, while she was still a State Senator, Levetan announced her candidacy for Federal office in the 4th U.S. Congressional District of Georgia.⁴ The State Committee had been active since Levetan's election in 2002 and remained so during her 2004 Congressional campaign.

¹ The Federal Committee provided a copy of the reimbursement check dated July 13, 2004 along with its response

² The poll became a major issue for Levetan soon after she announced her candidacy for Federal office and in the subsequent weeks leading up to the Congressional Primary race. Levetan received a great deal of criticism from her opponents for allowing her State Committee to pay for the entire cost of the poll. Levetan initially denied that the poll was intended to benefit her Federal candidacy at all or that the Federal Committee should have paid for any of the poll costs. The response reflects a change in position with Respondents acknowledging that the poll was designed to benefit both the State and Federal committees on a 50/50 ratio basis. Respondents also asserted that the Federal Committee's reimbursement to the State Committee for 50% of the poll cost was done "in light of political circumstances" although not "legally necessary." Respondents appear to be arguing that it would have been acceptable for the State Committee to pay the entire cost of a poll that benefited the Federal committee.

³ Cooper & Secrest issued a polling advisory on April 21, 2004, stating that Levetan was "uniquely positioned to claim Representative Majette's open seat" and referring to the polling results as "compelling." The advisory also mentions one question asked of the 504 persons polled and the ranking of the responses in relation to each potential candidate. However, the polling advisory does not provide the nature of the specific question asked. Neither Cooper & Secrest nor Levetan made the poll contents or the poll results available to the public. As far as we have been able to determine, only the polling advisory was released to the public, and it only contained a portion of the poll results relating to Levetan's potential Federal candidacy.

⁴ Prior to her announcement on April 27, 2003, Levetan did not undertake actions indicating she had become a candidate. For example, she did not advertise an intention to run for Federal office, refer to herself as a candidate, or raise funds in excess of what would be expected to be used for exploratory activity. See 11 C.F.R. § 100.131(b)(1) – (b)(4). The Federal Committee did not receive its first contribution, after the testing the waters phase, until May 7, 2004. See 2 U.S.C. § 431(2)(A).

The Commission found that Levetan became a candidate for Federal office on April 27, 2004, when she announced her intention to seek office and after she exceeded the dollar threshold. Because Levetan continued to run campaign committees for both her state senate position and her election to federal office, the complaint questions whether her congressional campaign was helped by expenditures made by her ongoing state senate committee account. Federal candidates or entities directly or indirectly established, financed, maintained or controlled by them, are restricted from soliciting, receiving, directing, transferring, or spending "soft money", i.e. non-federal funds that are not subject to the limitations of the Act.⁵ 2 U.S.C. § 441i(e)(1)(A). Further, transfers from a candidate's campaign committee or account for a nonfederal election to his or her principal campaign committee or other authorized committee for a Federal election are prohibited. 11 C.F.R. § 110.3(d).⁶

The Commission found that the transfer of the poll results by the State Committee, acting as Levetan's agent, to the Federal Committee was a prohibited transfer in violation of the Act and regulations. See 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d).⁷ The Commission also concluded that, when the State Committee paid for the entire cost of the poll, the results of which were transferred to the Federal Committee, it made an in-kind contribution to the Federal Committee.

⁵ The Commission concluded that there were no violations of 2 U.S.C. §§ 441i(e)(1)(B) or (e)(2) since Levetan was a legitimate state candidate at that time.

⁶ The Commission made clear its decision to "effectively prevent the indirect use of impermissible funds in federal elections" and explained that "a prohibition on all transfers from state to federal campaigns, is the best way to address concerns raised in the Petition for Rulemaking." *Explanation and Justification* for 11 C.F.R. § 110.3(d) at 57 Fed. Reg. 36,344 (August 12, 1992).

⁷ The State of Georgia allows corporations to make contributions to State elections so it possible that a portion of the funds used by the State Senate Committee to pay for the poll came from sources prohibited by the Act. See Ga. Code § 21-5-41 (2005).

Although the State Committee initially paid for the entire cost of the poll, we agree with the Federal Committee's assertion that the poll was intended to benefit both Levetan's potential State and Federal campaigns. The Commission found that one purpose of the poll was to aid Levetan in deciding whether to run for re-election or seek Federal candidacy. Section 106.4(a) of the regulations states that the purchase of opinion poll results by a candidate or a candidate's authorized political committee or agent is an expenditure by the candidate. 11 C.F.R. § 106.4(a). Section 106.4(e)(1) through (e)(4) provide several different methods for calculating the amount of the expenditure attributable to each candidate-recipient. 11 C.F.R. §§ 106.4(e)(1) – (e)(4). One of those methods, found in section 106.4(e)(2), provides that the amount of the expenditure attributable to the state candidate recipient Levetan and Federal candidate recipient Levetan can be computed by dividing the overall cost of the poll equally among the candidates (including State and local candidates) receiving the results. 11 C.F.R. § 106.4(e)(2). In this instance, the State Committee was acting as an agent for candidate Levetan when it purchased the opinion poll results. Accordingly, dividing the cost of the poll, \$21,345, equally among the candidates receiving the results, results in an allocation of 50% for each candidate for the poll cost, or \$10,672.50.

The Federal Committee, on July 13, 2004, reimbursed the State Senate Committee for 50% of the cost of the poll, or \$10,672.50 and disclosed the reimbursement on its October 2004 Quarterly Report as it indicated it would in its response.⁸ Therefore, the Commission found reason to believe that the State Committee violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d) by making a prohibited transfer to Levetan for Congress.

⁸ The Federal Committee amended its disclosure report in October 2004, within three months of the July 8, 2004 due date for the 2004 Pre-Primary Report